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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1205

BEN D. SPIVAK and DAVID S. SHAPIRO,

Petitioners,

against

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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The reasons why the petition should be granted are fully stated in petitioner's Argument (Petition, pp. 6-14) and will not be repeated here. Additional reasons for granting the petition have been presented by the arguments contained in the Government's memorandum in opposition.

I

Replying to Government's Point II (Memorandum in Opposition, pp. 3-7).

The artificial reasoning of the Government with respect to the basic purposes of Section 6672, Title 26, U.S.C., clearly indicate that review by this Court should be had to settle the important questions raised by the petition.

The Government at first appears to concede that Section 6672 serves merely to provide the Government with an alternate source of collection, in the event that the taxes cannot be collected from the corporation. *Kelly* v. *Lethert,* 362 F. 2d 629 (C.A. 8). Recognizing that the withheld trust funds were not lost but were being administered as part of the bankruptcy estate of Lincoln Industries and that full application of the principles announced in *Kelly* v. *Lethert, supra,* would be fatal to the judgment against petitioners, the Government seeks to enmesh these principles and the issues of this case in its mechanics of collection, which since they were not followed here are irrelevant.

Here the Government elected to proceed directly against the withheld trust funds in possession of the Bankruptcy Court. This brought it face to face with a forceful challenge to its right to the basic liability of the corporation. The Government then compromised and obtained the approval thereof by the Bankruptcy Court and thereby conclusively disposed of the merits and the unpaid taxes of its case as fully and finally as by any judgment. *Cia Anon Venezeolana De Navegqcion* v. *Harris,* 374 F. 2d 33, 35 (C.A. 5), and the cases there cited. Thus, all the Government's attempts to claim that there is an unpaid balance due for taxes are presumptively without merit. Without unpaid taxes, there can be no penalty.

The Government says that, since the penalties imposed on petitioners represent only that amount not collected from the bankruptcy estate because of the compromise, these impositions on petitioners are not penalties but unpaid taxes (Government's Memorandum, p. 6, footnote 4). Thus the Government seeks to employ Section 6672 as a vehicle to escape the binding effect of the prior determination of its claim.

In its brief in the Court of Appeals (Appellee's Brief, p. 16), however, the Government expressly abandoned any reliance on the doctrine that Section 6672 authorizes the

collection of the taxes from the corporation and the penalties, in equal amount, in addition thereto from the officers. See, *United States* v. *Mr. Hamburg Bronx Corp.*, 228 F. Supp. 115 (S.D.N.Y.), where the Government obtained a ruling that it was an error of law for it to apply recoveries of penalties from officers against the corporation's liability for the taxes. Now the Government seeks by indirection to revive that purportedly abandoned doctrine.

Thus again the Government's argument ignores the binding effect of the compromise of its tax claims and seeks to construct a substantive liability by a strained analysis of mere mechanical provisions of its collection procedure. As Section 6672 does not authorize the exaction of penalties in addition to the tax, then, contrary to the Government's assertions of administrative grace in the abatement of penalties to the extent of the compromise payment, an attempt to collect the amount of unabated penalties from petitioners is wrongful, since by virtue of the compromise no taxes are unpaid.

That issue has never been decided by this Court and it should be since the reliance by the Government on its collection mechanics has here forced it once more into a claim of error of law. *Cf. United States* v. *Mr. Hamburg Bronx Corp. supra.*

II

Replying to Government's Point I (Memorandum in Opposition, pp. 2-3)

No case cited by the Government addresses itself to the issues raised by the petition as to whether Section 6672 liability can survive a conclusive settlement of the corporation's basic liability for the taxes. Especially significant is the Government's failure to present any authority for its argument that there can be a "willful failure" within the meaning of the statute where the more than sufficient

trust funds of the withheld taxes are held in the custody of the Bankruptcy Court and have not been lost and where the only reason for its failure to collect all the taxes from the corporation was the Government's own unwillingness to test in litigation the merits of its claim therefor and its compromise on that account.

The authorities cited at page 3 of the Government's Memorandum all deal with situations, not present here, where the trust funds had been lost or where the Government had affirmatively *in limine* elected not to proceed against the corporations. See, *Dillard* v. *Patterson,* 326 F. 2d 302 (C.A. 5); *Cash* v. *Campbell,* 346 F. 2d 670 (C.A. 5).

The obvious legal distinctions between those cases and the situation at bar require review by this Court to settle the question raised by the petition as to whether such holdings could be decisive of the issues at bar.

CONCLUSION

Review by this Court is necessary to settle the questions raised by the petition as to the correct interpretation of the provisions of Section 6672, Title 26, U.S.C.

Respectfully submitted,

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